Supreme Court, U.S.
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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES M. MORGAN, Superintendant of the State Correctional Institution at Smithfield; the ATTORNEY GENERAL of the STATE OF PENNSYLVANIA,
Petitioners,

v.

STEVEN ACKERIDGE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

RONALD EISENBERG
Deputy District Attorney
(*Counsel of Record*)
THOMAS W. DOLGENOS
Chief, Federal Litigation
DAVID CURTIS GLEBE
Assistant District Attorney
ARNOLD H. GORDON
First Asst. District Attorney
LYNNE ABRAHAM
District Attorney

1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700

52pp

QUESTION PRESENTED

Where there is good reason to conclude that Congress did not intend the general doctrine of "equitable tolling" to apply to the habeas limitations provisions established in Title I, Section 101 of the Anti-terrorism and Effective Death Penalty Act of 1996, may the federal courts nevertheless apply the doctrine in their discretion?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit in this case.)

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ORDERS AND OPINIONS BELOW

The judgment and opinion of the Third Circuit Court of Appeals, dated November 15, 2001, remanding the habeas petition of Steven Ackeridge to the district court for an evidentiary hearing on the possible applicability of equitable tolling, are reproduced at App. 1-8.

The district court's order, dated April 3, 2000, dismissing Ackeridge's habeas petition as untimely, is reproduced at App. 9-10. The report of the federal magistrate, dated March 21, 2000, recommending that Ackeridge's petition be dismissed as untimely, is reproduced at App. 11-15.

STATEMENT OF JURISDICTION

The Third Circuit Court of Appeals remanded Ackeridge's habeas case to the district court on November 15, 2001 – this is the judgment upon which petitioners seek this Court's direct review.

This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. Section 2244(d):

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to

the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

On December 6, 1996, Ackeridge pled guilty in the Court of Common Pleas of Philadelphia County to multiple counts of robbery, burglary, and other crimes. He was sentenced to a term of six and one-half to fifteen years

imprisonment. App. 11-12. Ackeridge did not appeal, nor seek collateral review at the state level. App. 12.

On December 27, 1999, almost two years after the deadline to file a timely habeas application had expired, Ackeridge filed a petition for habeas relief with the United States District Court for the Eastern District of Pennsylvania, under 28 U.S.C. Section 2254. App. 12. The application was initially reviewed by a federal magistrate, who issued a report, dated March 21, 2000, recommending that the petition be dismissed as untimely under 28 U.S.C. Section 2244(d). App. 11-15. On April 3, 2000, the district court approved and adopted the magistrate's report and recommendation, and entered an order dismissing Ackeridge's habeas petition as untimely. The district court found no grounds to issue a certificate of appealability. App. 9-10.

Ackeridge thereafter sought review by the Third Circuit Court of Appeals, which granted him a certificate of appealability. The Third Circuit had jurisdiction over Ackeridge's case under 28 U.S.C. Sections 1291 and 2253. After briefing by the parties, on November 15, 2001, the Third Circuit remanded Ackeridge's case to the district court for an evidentiary hearing on the possible application of equitable tolling. App. 1-8.

Petitioners, who are the respondents in connection with Ackeridge's habeas proceedings before the district court and court of appeals, seek this Court's direct review of the Third Circuit's remand judgment, and the important question of federal law presented thereunder.

REASONS FOR GRANTING THE WRIT

BECAUSE THERE ARE GOOD REASONS TO CONCLUDE THAT CONGRESS DID NOT INTEND THE GENERAL DOCTRINE OF "EQUITABLE TOLLING" TO APPLY TO 28 U.S.C. SECTION 2244(d), THE THIRD CIRCUIT'S ASSUMPTION THAT "EQUITABLE TOLLING" MAY APPLY IN THE PRESENT CASE AND OTHERS RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

I. The Third Circuit Court Of Appeals, And Other Federal Courts, Have Utilized The General Doctrine Of "Equitable Tolling" As A Means Of Avoiding The Strict Limitations Period Adopted By Congress In The Amended Habeas Statute.

In this case, the Third Circuit Court of Appeals remanded an untimely-filed habeas application to the federal district court for an evidentiary hearing to determine whether the petition could nevertheless be reviewed under the general, non-statutory doctrine of equitable tolling. App. 1-8. The Third Circuit's ruling, as well as those of several federal courts in other habeas cases, is based upon the assumption that the *explicit* one-year limitations period set forth in the amended habeas statute is subject to *implicit* equitable exceptions. *See* 28 U.S.C. Section 2241, *et seq*. Because this assumption is demonstrably invalid, the Third Circuit's utilization of "equitable tolling" in this case and others presents an important question of federal law that must be settled by this Court. Supr. Ct. R. 10(c).

The application of the general doctrine of equitable tolling to untimely-filed petitions for habeas relief was engendered by the recent amendments to the habeas statute. In 1996, Congress adopted, and the President signed into law, the Anti-terrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214 (April 24, 1996) ("AEDPA"). Title I of AEDPA was designated by the Congress as "Habeas Corpus Reform," and Section 101 thereunder provides that a one-year period of limitations "shall apply" to applications for the writ of habeas corpus, with certain specifically-enumerated exceptions. *See* 28 U.S.C. Section 2244(d).

Following the adoption of AEDPA, however, the Third Circuit and many other federal courts determined that the one-year limitations period mandated by Congress required judicial expansion. Applying the general doctrine of equitable tolling to many cases in which habeas petitions were untimely-filed under Section 2244(d), those courts have held that additional, non-statutory timeliness exceptions may, in their discretion, be engrafted *ad hoc* upon the amended habeas statute. *See, e.g.*, Miller v. New Jersey Department of Corrections, 145 F.3d 616 (3d Cir. 1998); Calderon v. U.S. District Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), *cert. denied*, 523 U.S. 1061 (1998); Davis v. Johnson, 158 F.3d 806 (5th Cir.), *cert. denied*, 526 U.S. 174 (1999); Smith v. McGinnis, 208 F.3d 13 (2d Cir.), *cert. denied*, 531 U.S. 840 (2000); Harris v. Hutchinson, 209 F.3d 325 (4th Cir. 2000) (all holding that federal courts may use equitable tolling under various factual circumstances to preclude dismissal of habeas petitions that are untimely under provisions of Section 2244(d)).

Although most federal courts have apparently endorsed the application of equitable tolling under Section 2244(d), some courts have expressed doubts about the doctrine's applicability. *See, e.g.*, Giles v. United States, 6 F.Supp.2d 648 (E.D.Mich. 1998) (rejecting equitable tolling under substantially equivalent limitations provisions of 28 U.S.C. Section 2255); Taliani v. Chrans, 189 F.3d 597 (7th Cir. 1999) (expressing doubts that general doctrine of equitable tolling may be applied to amended habeas statute, given equitable exceptions already contained therein); Donovan v. State of Maine, 276 F.3d 87, 2002 WL 15802, at *4 (1st Cir. 2002) (expressing doubt that equitable tolling is available, "even in a factually appropriate case," under Section 2244(d)(1), *citing* Delaney v. Matesanz, 264 F.3d 7, 14 (1st Cir. 2001) (declining to resolve issue of possible applicability under Section 2244(d) of equitable tolling doctrine)); *compare* Lonchar v. Thomas, 517 U.S. 314 (1996) (federal court may not dispose of habeas petition by applying special *ad hoc* equitable principles rather than statutory and rule-based doctrines of law); Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989) (rejecting notion that courts, rather than legislature, should assume authority to revise statute to eliminate possible injustice thereunder).

Under the prevalent view, federal judges have assumed the authority, essentially whenever they perceive that good cause exists, to entertain habeas petitions that are untimely under the limitations period established by Congress. Federal courts have thus determined that the explicit filing limitations expressed in Section 2244(d) may generally be avoided when "the principles of equity make the rigid application of the statute of limitations unfair," Miller, 145 F.3d at 618, or when "demanded by sound legal principles as well as the interests of justice." Jones v.

Morton, 195 F.3d 153, 159 (3d Cir. 1999). Clearly, such a rationale is tautological, being equivalent to the premise: "Equitable tolling is warranted whenever a federal court deems it equitable."

Application of such a general and open-ended doctrine obviously entails the exercise of significant discretion by the federal courts to augment, and thereby to circumvent, the strict timeliness provisions set forth by Congress in the amended habeas statute. Indeed, in practice the application of equitable tolling becomes a blank check, under which federal courts may in any given case decide, in their own discretion, whether the limitation period adopted by Congress under AEDPA is relevant or not. Although the federal courts have generally declared that equitable tolling exceptions to the habeas statute should be used in a "sparing" manner, limited only to the "rare situation" of unfairness, Jones, 195 F.3d at 159, the doctrine is nevertheless sufficiently flexible and wide-ranging to apply to any particular set of circumstances that a federal court may happen to believe is "unfair."

Significantly, since judicial considerations of "fairness" or "good cause" are always fact-specific, it follows that when a federal court suspects that an equitable tolling "defense" might be applicable to an untimely habeas application, an additional evidentiary hearing on that issue will typically be required, based upon the allegedly "unfair" conditions that might have prevented the petitioner's timely filing. In this manner, the federal courts' application of the equitable tolling doctrine to Section 2244(d) has already spawned a new level of satellite litigation in habeas cases, inevitably causing increased delays in the disposition of untimely habeas petitions. *See, e.g.*, Nara v. Frank, 260 F.3d

310, 320 (3d Cir. 2001) (because habeas petitioner's unsupported allegations of mental ailment and attorney errors presented possible defenses under equitable tolling doctrine, additional evidentiary hearing was warranted).

The Third Circuit's treatment of Ackeridge's case demonstrates the troublesome manner in which the doctrine of equitable tolling can be applied by the federal courts to disregard the limitations period established by Congress under Section 2244(d). Ackeridge generally contended in his habeas petition that his guilty plea had been improper because he suffered from mental incapacity at the time of the plea. The federal magistrate, who initially reviewed the petition, as well as the district court judge, concluded that Ackeridge's habeas petition was clearly untimely under Section 2244(d), and should be dismissed. App. 11-15.

Ackeridge appealed to the Third Circuit. Notably, he made no showing, or even claim, that the alleged mental disability at the time of his guilty plea had also been present during the relevant one-year limitations period under Section 2244(d), which purportedly would have constituted the "good cause" to ignore the untimeliness of his habeas filing. The Third Circuit nevertheless speculated that, "[I]f Ackeridge was incompetent at the plea hearing, it is conceivable that he remained incompetent during at least some portion or perhaps all of the limitations period." App. 7.

Hence, merely upon the basis that Ackeridge had a potential equitable tolling "defense," the Third Circuit remanded the case to the district court for an evidentiary hearing as to his cursory allegations of mental impairment. *Compare* Nara, *supra* (comparable use of equitable tolling). If the district court finds against Ackeridge after the

evidentiary hearing, he could, of course, appeal that disposition to the Third Circuit, and so on. Remarkably, the entire course of such "spin off" litigation, which predictably would take a considerable amount of time, will have occurred over a habeas petition that is **facially untimely under Section 2244(d)**. App. 12-15.

Even though this Court has observed in non-habeas cases that statutory limitations periods may generally be subject to equitable considerations, *see, e.g.*, Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990), the application of this principle is clearly prohibited where the statutory language plainly allows for no supplemental timeliness exceptions, and when the purposes and logical coherence of the statute itself would be undermined thereby. As this Court firmly stated in United States v. Beggerly, 524 U.S. 38, 48 (1998), **"[E]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute"** (emphasis added). *See also* Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946) ("If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive."), *citing* Herget v. Central Nat. Bank & Trust Co. of Peoria, 324 U.S. 4, 7-8 (1945) (in enacting narrow limitations period under bankruptcy statute, Congress could have applied more expansive limits available under state law if desired, but Congress' "failure to do so cannot be ignored"); *compare* Bowen v. City of New York, 476 U.S. 467 (1986) (application of equitable tolling is appropriate because it is clearly contemplated by language of Congress' statutory scheme).

In the recent case of United States v. Brockamp, 519 U.S. 347 (1997), this Court adopted its approach in Irwin as a

means of establishing the proper analytic inquiry when considering the possible applicability of equitable tolling principles to a federal limitations statute. In Brockamp, as in Irwin, this Court asked the negatively phrased question: **"[I]s there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?"** *Id.*, 519 U.S. at 350 (emphasis in original).

Contrary to the mechanistic approach of the Third Circuit and other federal courts that have addressed the equitable tolling issue in the habeas context, this Court in Brockamp did not simply ask whether the applicable statutory limitations period was "jurisdictional" or not. Rather, this Court examined the equitable tolling issue by looking directly at the more fundamental question of Congressional purposes and intentions in adopting the statute. *Compare* Calderon, *supra*; Miller, *supra*; Davis, *supra* (all reasoning that because AEDPA limitations period does not appear to be "jurisdictional" in nature, equitable tolling doctrine automatically applies).

In the habeas context, this Court has not yet addressed the issue of whether the federal courts' application of open-ended equitable tolling principles under Section 2244(d) is legitimate. Because the Third Circuit's assumption – that equitable tolling may be applied in Ackeridge's case and others – undermines the reformative intentions of Congress in adopting AEDPA, and results in consequences that are demonstrably inconsistent with those intents, a writ of *certiorari* is warranted on this "important question of federal law that has not been, but should be, settled by this Court." Supr. Ct. R. 10(c).

Applying the analytic approach in Brockamp and Irwin here, petitioners maintain that there are indeed good reasons to believe that Congress did **not** intend the general doctrine of equitable tolling to apply to Section 2244(d). Rather, Congress was entitled to assume that the timeliness provisions of AEDPA meant precisely what they said, *viz.*, to prescribe a certain period and no more. *See, e.g.*, Soriano v. United States, 352 U.S. 270 (1957) (federal courts have no authority to use equitable principles to create exceptions to statutory limitations period), *citing* Kendall v. United States, 107 U.S. 123, 125 (1883) (federal courts may not "superadd to those [timeliness exceptions] enumerated" in federal statute other extensions based upon equitable principles).

II. Congress Did Not Intend That The General Doctrine Of Equitable Tolling Should Apply To Section 2244(d).

Prior to Congress' adoption of the "Habeas Corpus Reform" provisions of AEDPA, there was no express limitations period under federal habeas law, and as a result, dilatory petitioners could substantially delay the filing of habeas applications for years. In establishing limitations periods under AEDPA, Congress' primary purposes were remedial – to alleviate delays, to expedite the prompt review and disposition of habeas petitions, and to encourage finality. *See, e.g.*, Calderon, 128 F.3d at 1286 (given absence of express limitations period under previous habeas law, Congress' adoption of AEDPA "dramatically changed the landscape" by establishing one-year limitations period); Fisher v. Johnson, 174 F.3d 710, 713 & n.10 (5th Cir. 1999) (AEDPA's new limitations period was intended to "speed up the habeas process"); Sperling v. White, 30 F.Supp.2d 1246, 1251, 1253 (C.D.Cal. 1998) (noting remarks by AEDPA co-sponsor Sen. Hatch, emphasizing that Congress' purposes

were to set strict time limits in habeas cases, to reduce delay, and to ensure finality); *see also* "Joint Explanatory Statement of the Committee of the Conference," S. 735, Title I—Habeas Corpus Reform (Congress' purposes in adopting AEDPA were "to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases"); 142 Cong.Rec. S3472 (daily ed. Apr. 17, 1996) (statement of Sen. Specter) (AEDPA was designed to "impose a statute of limitations on the filing of habeas corpus petitions"); 141 Cong.Rec. S7840 (daily ed. June 7, 1995) (statement of Sen. Biden) ("I agree ... that we ought to have a strict statute of limitations and a strict limit on successive petitions.")

Given Congress' express purposes in reforming the habeas statute, it can be demonstrated that Congress did not desire that the general doctrine of equitable tolling be applied under AEDPA, and in particular, to Section 2244(d). *First*, an examination of the language of the amended habeas statute shows that no additional equitable considerations, other than those specifically articulated therein, could have been intended by Congress. *Second*, consideration of the purposes underlying AEDPA shows that Congress could not have intended the necessary delays that the application of equitable tolling engenders. *Third*, Congress' express adoption under AEDPA of a "good cause" exception to the timeliness provisions relating to capital cases shows that Congress did not intend that broad timeliness exceptions entailed by general equitable tolling apply to cases brought under Section 2244(d).

These compelling reasons against the applicability of equitable tolling to Section 2244(d) will now be examined *seriatim*.

A. Because Congress Set Forth Explicit And Detailed Timeliness Exceptions In Section 2244(d), It Follows That Congress Did Not Intend Additional, Non-Statutory Timeliness Exceptions Under The General Doctrine Of Equitable Tolling To Apply.

In order to undertake the evaluative inquiry adopted by this Court in Brockamp, the question of whether Congress did not intend equitable tolling to apply to Section 2244(d) may initially be approached by a straightforward review of the statutory language itself. *See* McCarthy v. Bronson, 500 U.S. 136, 139 (1991) ("In ascertaining the plain meaning of a statute, the court must look at the particular statutory language at issue, as well as the language and design of the statute as a whole.") (internal quotations omitted). The question of legislative intent may also be analyzed by examining the statute's purposes and policy as well as its legislative history. *See* Crandon v. United States, 494 U.S. 152, 158 (1990) ("[i]n determining the meaning of a statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy"). In addition, application of the traditional canons of statutory interpretation, such as the principle that no part of a statute is to be rendered superfluous, is instructive. *See, e.g.*, Bennett v. Spear, 520 U.S. 154 (1997) (applying cardinal principle of statutory construction that every clause and word be given operative effect).

When examined carefully, the words used by Congress in Section 2244(d), as well as the applicable interpretive canons, answer the Brockamp question in the affirmative. Namely, Congress did **not** intend that additional

timeliness exceptions be permitted under the general doctrine of equitable tolling.

The text of Section 2244(d)(1) sets forth the one-year period that "shall apply" to applicants for the writ, and in that provision Congress described in detail the four distinct "dates" upon which the limitations period may be deemed to commence. The first such date is when the petitioner's judgment becomes final at the conclusion of direct review. *See* 28 U.S.C. Section 2244(d)(1)(A).

It is significant that the three remaining dates clearly articulate Congress' own "fairness" considerations regarding the application of the one-year limitations period. Section 2244(d)(1)(B) is essentially a version of the common law equitable prescription against fraudulent concealment. Section 2244(d)(1)(C) conveys the equitable notion of allowing habeas review after the recognition by this Court of a new constitutional right that is made retroactively applicable. Section 2244(d)(1)(D) derives from the equitable "discovery" principle that a limitations period does not begin until a diligent party knows, or should know, of the factual predicate underlying a claim. *See* Miller, 145 F.3d at 618. Besides these concerns, Section 2244(d)(2) also expresses Congress' intent that the limitation period be tolled during the pendency of properly-filed applications for collateral relief at the state level.

If Congress had indeed intended that, in addition to the equitable grounds already specified in the statute, federal courts could also entertain untimely habeas applications on general "good cause" grounds, whenever the dismissal of such petitions would be "unfair," then Congress could have easily appended another provision to Section 2244(d) saying

precisely that. But Congress did **not** include such general language along with its enumeration of certain specific equitable exceptions. In the words of this Court, the plain fact that Congress did **not** add such a "catch-all" equitable provision to Section 2244(d) "cannot be ignored." Herget, 324 U.S. at 8.

This Court's analysis of the statutory language in Brockamp is instructive on this issue. Examining the language of the tax statute in that case, this Court found the time limitations to have an "unusually emphatic form," distinguishable from ordinary limitations statutes which "use fairly simple language" that can plausibly be read to contain an implied equitable tolling exception. *Id.*, 519 U.S. at 350. Because the limitations provisions at issue in Brockamp contained detailed rather than general language, this Court determined that the statute "cannot easily be read as containing implicit exceptions." *Id.* This Court concluded that the detail of the statute and its explicit listing of exceptions indicated that **"Congress did not intend courts to read other, unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote."** *Id.*, 519 U.S. at 352 (emphasis added); *see also* TRW, Inc. v. Andrews, -- U.S. --, 122 S.Ct. 441, 447 (2001) (by including explicit rules in statute, Congress implicitly excluded general rules, *citing* Brockamp); Andrus v. Glover Constr. Co., 446 U.S. 608, 616-617 (1980) (where "Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent").

Precisely the same considerations apply to the Third Circuit's adoption of general equitable tolling considerations in Ackeridge's case and others. Because Congress plainly

established detailed and legally technical limitations provisions in Section 2244(d), containing explicit equitable exceptions, the amended habeas statute, as with the tax statute in Brockamp, cannot "easily be read as containing implicit exceptions." Following the same reasoning as in Brockamp to its most reasonable conclusion, the emphatic language as well as the technical detail contained in the amended habeas statute demonstrate that Congress did not intend federal courts to apply general equitable tolling exceptions to Section 2244(d).

Some of the federal courts that have examined the language of Section 2244(d) have agreed that the statute appears to mean exactly what it says about the scope of the limitations period, and does not evidence any intent by Congress to permit additional open-ended timeliness exceptions on general equitable tolling grounds. For example, in Taliani, *supra*, Chief Circuit Judge Posner observed that because the subsections of Section 2244(d) already contained several explicit equitable provisions, "it is unclear what room remains for importing the judge-made doctrine of equitable tolling." *Id.*, 189 F.3d at 598; *compare* Beggerly, 524 U.S. at 48-49 (general equitable tolling not intended by Congress because statute already provided specific form of equitable tolling for discovery of claims).

Similarly, in Giles, *supra*, a federal district court examining Congressional intent as expressed in the limitations period under 28 U.S.C. Section 2255 (which is substantially identical to Section 2244(d)(1), containing specific equitable exceptions), held that:

> [T]he language of the § 2255 indicates that Congress intended to limit a federal court's

> discretion in tolling the one year time limit. Section 2255 expressly lists four different events, the latest of which determines when the limitations period begins to run. (Citation omitted.) The detail of § 2255 and its direct and express determination of when the time limit begins indicates that **Congress did not intend to permit courts to read other unmentioned and open-ended equitable exceptions into the statute.** (*Citing* Brockamp, *supra*.)

Id., 6 F.Supp.2d at 650 (emphasis added). The Giles Court concluded that because Congress had not intended that additional equitable tolling considerations were to apply under AEDPA, the federal courts should be confined to those exceptions included in the amended statute. *Id.*, 6 F.Supp.2d at 649.

Significantly, the same conclusion directly follows from the application of well-settled principles of statutory construction to Section 2244(d). Assuming *arguendo* that Congress had intended the general doctrine of equitable tolling to apply to the one-year limitations period in Section 2244(d), it follows directly that **Congress would then have had no reason to adopt the three specific equitable conditions enumerated in Sections 2244(d)(1)(B), (C), or (D).** That is, each of the three equitable circumstances that were established by Congress in Section 2244(d) would clearly have been accounted for, and subsumed under, the general "good cause" and "unfairness" doctrines of equitable tolling.

Such a result means that Sections 2244(d)(1)(B), (C), and (D) are mere surplusage, with no operative effect. But that inference is plainly unacceptable, because the principles of statutory construction dictate that no statute may be interpreted to render some of its provisions superfluous. *See* Bennett, *supra*. Accordingly, it follows deductively from Congress' inclusion of specific and detailed equitable exceptions in Section 2244(d) that Congress did **not** intend that general equitable tolling considerations would also apply. *See* Beggerly, *supra* (equitable tolling doctrine is impermissible when inconsistent with text of relevant statute).

Therefore, the Third Circuit Court of Appeals – as well as the majority of federal courts that have decided to apply general equitable tolling principles on an *ad hoc* basis under Section 2244(d) – cannot be correct on this issue. This Court must settle this important question of federal law in a definitive manner by rejecting the Third Circuit's application of equitable tolling to otherwise untimely petitions under the amended habeas statute.

B. Because The Application Of Equitable Tolling To Habeas Cases Under Section 2244(d) Necessarily Engenders Additional Delay, Directly Undermining Congress' Express Purposes And Policies In Reforming Habeas Law, It Follows That Congress Did Not Intend The General Doctrine Of Equitable Tolling To Apply.

As discussed above, it is undisputed that Congress' purposes in amending the habeas statute under AEDPA were to reduce delays in the disposition of habeas applications, to speed up the habeas process, and to encourage genuine finality, especially of state convictions that have withstood

the direct review process. *See, e.g.*, Calderon, *supra*; Miller, *supra* (both cases discussing legislative history and purposes of limitations provisions in AEDPA). In order to accomplish these reformative policies, Congress adopted a "strict" and detailed statute of limitations in Section 2244(d). *See* 141 Cong.Rec. S7840 (daily ed. June 7, 1995) (statement of Sen. Biden) (expressing support for AEDPA language adopting "a strict statute of limitations").

The application of general equitable tolling to Section 2244(d) by the Third Circuit in Ackeridge's case, and by the federal courts in other cases, directly undercuts Congress' express purposes and policies. This conclusion follows from the manner in which the federal habeas courts must typically treat petitioners' claims for equitable tolling in practice.

That is, because the courts generally need to decide equitable tolling questions by examining the **factual circumstances** underlying each particular proffer of this "defense," the application of this doctrine to otherwise untimely habeas petitions predictably causes, and even encourages, time-consuming satellite litigation regarding any number of "good cause" and "fairness" issues. Given the availability of equitable tolling as a possible "defense," it does not take much on the part of the otherwise untimely habeas applicant to stop the process in its tracks, and to divert the courts and the habeas respondents on the potentially long road of determining the merits of the applicant's equitable tolling claim. Because the less-than-specific basis of the equitable tolling doctrine is "fairness" towards the habeas applicant, even an **allegation** that unfair circumstances "prevented" a timely filing may be sufficient to force the courts into a time-consuming fact-finding posture. *See, e.g.*, Miller, *supra*; Nara, *supra* (both cases involving circuit court

remand of habeas case to district court for factual assessment of applicant's plea for equitable tolling).

As discussed hereinabove, Ackeridge's case presents precisely this type of scenario. Although the district court determined that Ackeridge's petition was clearly time-barred under Section 2244(d), the Third Circuit nevertheless remanded the case to the district court for an evidentiary hearing on the possibility that Ackeridge **might** have had a mental ailment during the one-year limitations period, which **might** have prevented him from filing his habeas petition in a timely manner. App. 6-7. Notably, Ackeridge did not even make this claim directly. Rather, his petition focused upon a claimed mental infirmity at the time of his guilty plea, which occurred before the one-year limitations period even began. App. 5-7. Consequently, in Ackeridge's case, not even a bare allegation of "unfair circumstances" from the habeas petitioner – much less some sort of "showing" – was required in order to commence time-consuming satellite litigation, because the Third Circuit's speculation about the possibility of such circumstances was sufficient.

Once the course of satellite litigation has begun, where the reviewing court must determine factual issues relating to the possible application of equitable tolling, the habeas applicant may effectively delay the process for a considerable period of time. *Pro se* applicants, who are typically incarcerated, will predictably move for the appointment of counsel, who will need time to review the case. Motions for discovery will often follow. Document production may need to commence – in the present case, for example, Ackeridge's medical history and treatment record while incarcerated may be relevant. Physical examinations may have to be scheduled and performed. Interrogatories

and requests for admissions may need to be served and answered. Witnesses may need to be located and subpoenaed, and depositions may need to be taken. Expert witnesses may need to be retained and called. Protective orders may have to be sought and issued. Motions to compel discovery may have to be litigated. And so on.

Even a cursory review of the federal cases dealing with equitable tolling shows that habeas petitioners have proposed a variety of possible "unfair" circumstances, purportedly preventing them from filing timely applications. Such claims typically necessitate additional evidentiary findings. In Ackeridge's case, the factual issue on remand from the Third Circuit is whether his vague claim of mental incapacity is sufficient to make the "rigid application of the statute of limitations unfair." Miller, 145 F.3d at 618. Various allegations of physical and mental impairment have also been presented to federal courts as possible grounds for equitable tolling. *See, e.g.*, Nara, *supra* (alleged period of mental impairment); Miller v. Runyon, 77 F.3d 189 (7th Cir. 1996) (alleged mental incompetence); U.S. ex rel. Kennedy v. Page, 1999 WL 1044829 (N.D.Ill. 1999) (claim of mental problem resulting from treatment with psychotropic drugs); Rhodes v. Senkowski, 82 F.Supp.2d 160 (S.D.N.Y. 2000) (alleged physical disability and resultant hospitalizations); Torres v. Miller, 1999 WL 714349 (S.D.N.Y. 1999) (alleged blindness and insanity); Sanders v. Kiley, 1995 WL 77916 (S.D.N.Y. 1995) (alleged depression and headaches).

In addition to allegations of physical or mental hardships, habeas petitioners have attempted to secure the review of untimely petitions through a wide assortment of other "equitable" claims and contentions. *See, e.g.*, Miller, *supra* (alleged denial of access to legal papers); Helton v.

Singletary, 85 F.Supp.2d 1323 (S.D.Fla. 2000) (counsel's misadvice); Smith, *supra* (inadequate prison law library and resources); Baskin v. United States, 998 F.Supp. 188 (D.Conn. 1998) (counsel's neglect); Molo v. Johnson, 207 F.3d 773 (5th Cir. 2000) (counsel's ineffectiveness); Fadayiro v. U.S., 30 F.Supp.2d 772 (D.N.J. 1998) (alleged lack of access to transcripts); Saldana v. Artuz, 2000 WL 1346855 (S.D.N.Y. 2000) (difficulty accessing library materials due to three months in solitary confinement and six months in prison lockdown); U.S. v. Gilmore, 1998 WL 397842 (N.D.Ill. 1998) (restricted access to law library caused by prisoner transfer and disciplinary action); Hennington v. Johnson, 2001 WL 210405 (N.D.Tex. 2001) (ignorance of habeas law and lack of legal assistance); U.S. v. Maldanado, 1997 WL 360932 (E.D.Pa. 1997) (alleged inability to speak English).

Although the federal courts have rejected pleas for equitable tolling in many such cases, the critical point is that the general nature of this "defense" entails that the factual circumstances of each allegation must be evaluated separately. Such evaluations invariably take time, and therefore cause additional delay in the habeas process.

Furthermore, given the considerable discretionary aspects inherent in the application of equitable tolling, federal courts might in future cases choose to extend the doctrine to any number of allegedly "unfair" circumstances, such as claims of educational deprivation, learning disability, emotional instability, distress over the death of a family member, organic brain damage, and so on. The possibilities of the doctrine's applicability are apparently only limited by the imaginations of habeas petitioners and their often-creative counsel. Predictably, claims that some variety of the

equitable tolling "defense" applies will likely become a **routine** part of the disposition of otherwise untimely habeas applications, as will the additional time-consuming litigation that the treatment of such claims necessitates. The new rule will essentially be – "If you are time-barred, just allege 'unfairness,' and at least you will get an evidentiary hearing."

Even if many pleas for equitable tolling are ultimately rejected by the courts, the practical application of this open-ended doctrine means that new layers of federal litigation, involving evidentiary hearings to assess equitable tolling claims, as well as possible appeals and remands afterwards, are being added to the habeas process. This is precisely what the Third Circuit is advancing in Ackeridge's case, *viz.*, an evidentiary hearing on a possible claim of equitable tolling, which will purportedly take place with respect to a petition that is facially time-barred under Section 2244(d). The predictable delay in Ackeridge's case, and the delays caused in other habeas cases under similar circumstances, will be considerable.

In adopting a strict limitations period under AEDPA for the express purposes of reducing delay, expediting habeas review, and encouraging finality, Congress could not possibly have intended that general "fairness" exceptions be applied to Section 2244(d), such that additional delays in the disposition of untimely habeas cases would inevitably result therefrom. Unquestionably, in amending the habeas statute by adding a "strict" limitations period, Congress was plainly attempting to lessen delay, not increase delay. In practice, the federal courts' application of equitable tolling to Section 2244(d) has the effect of eviscerating that provision.

Because the practical consequences of the *ad hoc* application of general equitable tolling to the habeas statute result in the increase of delays in the habeas process, and because this result is clearly inconsistent with Congress' purposes and policies in adopting AEDPA, it follows directly that Congress did **not** intend general equitable tolling considerations to apply to Section 2244(d). *See* Crandon, *supra* (courts must consider legislator's purpose and policy in ascertaining intent); *compare* Beggerly, *supra* (equitable tolling improper where inconsistent with statute).

The Third Circuit's decision in Ackeridge's case to remand for the possible application of equitable tolling considerations under Section 2244(d) cannot be correct. This Court should therefore grant the writ of *certiorari* in this case in order to address this important question of federal law, and to reject in a definitive manner the Third Circuit's application of general equitable tolling to the amended habeas statute.

C. Because Congress Explicitly Adopted A "Good Cause" Timeliness Exception For Capital Habeas Cases, It Follows That Congress Did Not Intend The General Equitable Tolling Doctrine To Apply Under Section 2244(d).

As discussed above, it is well-settled that in attempting to determine the intent of Congress, the reviewing court must look to the overall design of the relevant statute, treating it as a coherent and consistent whole, and giving effect to each of its provisions. *See* Crandon, *supra*. Accordingly, it has been held that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that

Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983) (citation omitted). Although this general interpretive principle, sometimes referred to as "*expressio unius est exclusio alterius*," may not be invoked where its application would lead to absurd results, *see, e.g.*, Burns v. United States, 501 U.S. 129, 136-138 (1991), the canon is nevertheless valid where its application otherwise indicates Congressional intent, and yields an interpretation that is consistent with the language, purpose, and policy of the relevant statute. *See* Andrus, *supra*.

Notably, this Court has already applied this interpretive principle to AEDPA, in the case of Lindh v. Murphy, 521 U.S. 320 (1997). In Lindh, this Court held that because Congress had specifically provided in Title I, Section 107(c) of AEDPA that the amendments were to apply to capital cases pending on the statute's effective date, but did not address the application of the statute to pending non-capital cases, the proper interpretive implication was that Congress did not intend AEDPA to apply to pending non-capital cases. *Id.*, 521 U.S. at 327.

Similar considerations apply in the present case, as to Congress' intentions regarding the possible applicability of general equitable tolling under Section 2244(d). An examination of the provisions of AEDPA specifically dealing with capital cases shows that Congress did not intend the doctrine to apply under Section 2244(d).

Under Title I, Section 107 of AEDPA, Congress added a new Chapter 154 to Title 28 of the United States Code, entitled "Special Habeas Corpus Procedures in Capital Cases." New Section 2263 of Title 28 specifically addresses

the filing of capital habeas applications, and sets forth strict and detailed timeliness requirements in those capital cases governed by Chapter 154. In particular, Section 2263(b) describes certain conditions for tolling of the filing requirements. Significantly, Congress chose to include among these tolling conditions a general "catch all" provision at Section 2263(b)(3)(B), which specifies that a habeas filing may be tolled during an additional period not to exceed 30 days, if "a showing of **good cause** is made for the failure to file the habeas corpus application within the time period established by this section." (Emphasis added.)

Consequently, it is apparent that under Section 2263, Congress specifically added a "good cause" exception to the timeliness requirements for capital habeas cases falling under Chapter 154. This type of exception – which is essentially a general equitable tolling provision – was plainly **not** included by Congress under Section 2244(d). Applying the *exclusio unius* principle to these circumstances, it follows directly that Congress did **not** intend a general "good cause" exception to be applicable to Section 2244(d). *See* Russello, *supra*; Lindh, *supra*.

All of the foregoing considerations plainly indicate that the Third Circuit's decision to remand Ackeridge's case for the possible application of equitable tolling under Section 2244(d) was incorrect. Because the issue presented by the Third Circuit's remand is an important question of federal law warranting this Court's direct review, the writ of *certiorari* should be granted.

In the words of this Court, by adopting a federal statute establishing definite filing limits for certain actions, "**Congress was entitled to assume that the limitation**

period it prescribed meant just that period and no more." Soriano, 352 U.S. at 276 (emphasis added). This assumption should apply under AEDPA – Congress' establishment of a strict period of limitations for habeas actions under Section 2244(d) should be construed to mean what it says, and no more.

Where Congressional intentions and purposes in adopting a statute are clear, the federal courts should not assume the discretionary authority to expand expressed statutory provisions through the application of open-ended equitable principles. As this Court observed in Lonchar, *supra*, with respect to the *ad hoc* application of judge-made equitable exceptions to the habeas procedural rules, such a practice by the federal courts "reveals the institutional inappropriateness of amending [the rules], in effect, through an ad hoc judicial exception, rather than through congressional legislation or through the formal rulemaking process." *Id.*, 517 U.S. at 328. The same considerations apply here – if additional equitable doctrines are to be engrafted into the amended habeas statute, it is for Congress to do so, not the federal courts. *See* Green, *supra*.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

RONALD EISENBERG
Deputy District Attorney
(*Counsel of Record*)
THOMAS W. DOLGENOS
Chief, Federal Litigation
DAVID CURTIS GLEBE
Assistant District Attorney
ARNOLD H. GORDON
First Asst. District Attorney
LYNNE ABRAHAM
District Attorney

1421 Arch Street
Philadelphia, Pennsylvania 19102
(215) 686-5700

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-1334

STEVEN ACKERIDGE, AKA
CURTIS LEE,
Appellant

v.

JAMES MORGAN;
THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA

On Appeal From the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. Civ. No. 99-cv-06570)
District Judge: Honorable Robert F. Kelly

Submitted Under Third Circuit LAR 34.1(a)
June 1, 2001

Before: ALITO, AMBRO and WEIS, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a). On consideration whereof, it is here ORDERED AND ADJUDGED by this Court that the

judgment of the District Court entered April 3, 2000, be and the same is hereby VACATED, and this matter is REMANDED for further proceedings. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: NOV 15 2001

UNREPORTED--NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
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Before: ALITO, AMBRO and WEIS, *Circuit Judges*.

(Filed NOV 15 2001)

OPINION

PER CURIAM.

Steven Ackeridge, a Pennsylvania inmate, appeals from the District Court's dismissal of his petition for a writ of habeas corpus as time-barred under AEDPA's one-year statute of limitations. We will vacate the dismissal and remand for a hearing to determine whether Ackeridge is entitled to an equitable tolling of the limitations period.

I.

On December 6, 1996, Ackeridge pleaded guilty in the Philadelphia Court of Common Pleas to three counts of robbery, two counts of burglary, one count of possessing an instrument of crime, and one count of criminal trespass. He was sentenced to 6-1/2 to 15 years imprisonment. Ackeridge did not file a direct appeal, and he did not pursue state post-conviction review. In December 1999, he filed a *pro se* habeas petition pursuant to 28 U.S.C. § 2254, alleging that he was "insane at the time of the offenses, and incompetent at the time of the guilty plea hearing." Petition at 7. Ackeridge allegedly told his counsel that he had a long history of mental illness and had been committed to various institutions, and also that he was being treated for schizophrenia while awaiting trial on the present changes. *Id.* Ackeridge claimed that counsel failed to investigate his sanity and his competency to enter the plea, and that counsel's assistance was ineffective.

The Commonwealth moved to dismiss the petition on the ground that it was untimely filed under the one-year limitations period, 28 U.S.C. § 2244(d)(1). The District Court adopted the Magistrate Judge's recommendation and dismissed the petition with prejudice as time-barred. Ackeridge appealed, and we granted a certificate of appealability on the timeliness issue. In particular, we directed the parties to

address whether the District Court erred in failing to consider an equitable tolling of the limitations period in light of Ackeridge's allegations of mental incompetency.

The District Court had jurisdiction pursuant to 28 U.S.C. § 2254(a). We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. Our review is plenary. *See Jones v. Morton*, 195 F.3d 153, 156 (3d Cir. 1999).

II.

A state prisoner must file a § 2254 petition within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). A *pro se* petition "is deemed filed at the moment [the prisoner] delivers it to prison officials for mailing to the district court." *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998). Applying these rules here, Ackeridge had to deposit his petition in the prison mail system on or before January 6, 1998 (*i.e.*, one year from the date on which his conviction became "final," and finality here occurred on January 6, 1997, which was the date on which Ackeridge's 30-day period to take a direct appeal to the Superior Court expired).[1] Ackeridge filed his petition, at the earliest, on December 9, 1999, which was the date he noted on the petition. That date was more than 23 months too late. Ackeridge did not seek state post-conviction review, so no tolling was available under 28 U.S.C. § 2244(d)(2). His only avenue for tolling was "equitable

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[1] The Magistrate Judge improperly calculated the time as running from AEDPA's enactment on April 24, 1996. Because Ackeridge's conviction became final on January 6, 1997, which was after AEDPA's enactment, Ackeridge had one year from that date, not from the date that AEDPA became law.

tolling." The District Court did not expressly address that issue.

We have held that a § 2254 petition cannot be dismissed as untimely if the petitioner establishes an equitable basis for tolling the limitations period. *Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 618 (3d Cir. 1998). Generally, equitable tolling is available only if the petitioner has in "some extraordinary way . . . been prevented from asserting his or her rights." *Id.* (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380 (3d Cir. 1994)). Courts have recognized that mental incompetency can qualify as an extraordinary circumstance to toll the AEDPA limitations period. *See Fisher v. Johnson*, 174 F.3d 710, 715-16 (5th Cir. 1999), *cert. denied*, 121 S. Ct. 1124 (2001); *Calderon v. United States Dist. Court for the Central Dist. of Cal.*, 163 F.3d 530, 541 (9th Cir. 1998) (en banc), *cert. denied*, 526 U.S. 1060 (1999). In *Calderon*, the Ninth Circuit adopted a rule that, "[w]hen a putative habeas petitioner's mental competency is at issue, and the record discloses a genuine basis for concern, it is appropriate to toll the AEDPA's time bar until a reasonable period after the district court makes a competency determination." 163 F.3d at 541; *see also United States v. Hill*, Civ. No. 99-1093-FR, 2000 WL 13 1389594, at *1 (D. Or. Sept. 18, 2000) (where "the record of the guilty plea submitted by the government disclosed a genuine basis for concern about defendant Hill's mental competency," the district court received further evidence on issue of petitioner's competency before it ruled that petition must be dismissed as time-barred).

We conclude that Ackeridge's allegations of incompetency raised a genuine basis for concern and therefore warranted fact-finding before the petition was dismissed. Ackeridge alleged a history of mental illness and

commitments for treatment. He allegedly "is diagnosed as a paranoid schizophrenic with depression and anxiety." Informal Br. at 2. The transcript of the plea colloquy reflects that Ackeridge was on psychotropic medication at the time of the plea. He alleged in the habeas petition that, due to mental illness, he was incompetent to enter the plea. We must accept Ackeridge's allegations as true on the present record.

The AEDPA limitations period began to run a mere 30 days after Ackeridge entered the plea. If Ackeridge was incompetent at the plea hearing, it is conceivable that he remained incompetent during at least some portion or perhaps all of the limitations period. Indeed, Ackeridge now contends that he was "very sick at the time to the extent that [he] did not have any knowledge of anything during the time of the month of July 1996 till on or about October 1999." Informal Br. at 2. If Ackeridge can substantiate this claim of "sickness" and show that it rendered him unable to file a timely habeas petition, then tolling would be warranted. *See Allen v. Lewis*, 255 F.3d 798, 800 (9th Cir. 2001) (explaining that "at the very least, the prisoner must show that the 'extraordinary circumstances' were the but-for and proximate cause of his untimeliness") (citing *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000) and *Marsh v. Soares*, 223 F.3d 1217, 1221 (10th Cir. 2000)). Ackeridge notes that he has requested his prison psychiatric records in order to prove his claim of illness during the limitations period. *See* Reply Br. at 3-4 and exhibits thereto. On this record, further inquiry into equitable tolling is warranted.

As a final matter, we agree with the appellees that tolling is unavailable insofar as Ackeridge seeks to rely on counsel's alleged ineffective assistance at the plea stage as the reason for his failure to file a timely petition. The only viable claim to tolling on the present record is the allegation that

mental illness rendered Ackeridge unable to comply with the limitations period.

III.

Because Ackeridge should have an opportunity to substantiate his claim to equitable tolling, we will vacate the District Court's judgment and remand for an evidentiary hearing on his alleged incompetency during the limitations period, and for further proceedings if necessary.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN ACKERIDGE : CIVIL ACTION

v. :

JAMES M. MORGAN, et al. : NO. 99-6570

ORDER

AND NOW, this 3rd day of APRIL, 2000, upon careful and independent consideration of the Petition for a Writ of Habeas Corpus, and after review of the Report and Recommendation o[f] Chief United States Magistrate Judge James R. Melinson, it is hereby ORDERED that:

1. The Objections filed by Petitioner are DENIED.

2. The Report and Recommendation is APPROVED and ADOPTED.

3. The Petition for a Writ of Habeas Corpus is DISMISSED with prejudice.

4. There is no probable cause to issue a Certificate of Appealability.

5. The Clerk of the Court shall mark this case closed for statistical purposes.

BY THE COURT:

/s/
ROBERT F. KELLY, J.

ENTERED APRIL 3 2000
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Steven Ackeridge,	:	CIVIL ACTION
Petitioner	:	
v.	:	
	:	
James M. Morgan, et al.	:	
Respondents	:	No. 99-CV-6570

REPORT AND RECOMMENDATION

FILED MAR 21 2000

JAMES R. MELINSON
CHIEF U.S. MAGISTRATE JUDGE

Before this court is a *pro se* petition for a writ of *habeas corpus* filed pursuant to 28 U.S.C. § 2254. The petitioner, Steven Ackeridge, is currently incarcerated at the State Correctional Institution - Smithfield in Huntingdon, Pennsylvania. For the reasons that follow, it is recommended that Ackeridge's petition be DISMISSED with prejudice.

FACTUAL AND PROCEDURAL HISTORY

On July 11, 1996, Ackeridge forced his way at gunpoint into the home of Mrs. Jermaine Stoy, a seventy-six (76) year old, bedridden woman. Ackeridge left after taking several hundred dollars from Mrs. Stoy's purse and threatening to kill Mrs. Stoy and her nurse. The police were notified and a warrant for Ackeridge's arrest was secured. On July 18, 1996, Ackeridge broke into the home of an eighty-six (86) year old woman, Mrs. Sara Stewart. The police arrived at Mrs. Stewart's house during the course of the robbery, and

Ackeridge escaped apprehension by leaving through a second-floor window. He was located and arrested within thirty (30) minutes.

These two crimes were consolidated for trial. On December 6, 1996, in the Court of Common Pleas of Philadelphia County, Ackeridge entered a plea of guilty to three counts of robbery, two counts of burglary, one count of possessing an instrument of crime, and one count of criminal trespass. He was sentenced to a total of thirty-four (34) to ninety (90) years' imprisonment. Ackeridge did not appeal his judgment of sentence, and he has not filed for collateral relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541, *et seq.*

On December 27, 1999, Ackeridge filed the instant petition for a writ of *habeas corpus* asserting a claim of ineffective assistance of counsel. The Commonwealth has filed a response asserting that the petition is time-barred and must be denied.

DISCUSSION

Federal *habeas* review is precluded where the petitioner does not satisfy the applicable period of limitations. Specifically, 28 U.S.C. § 2244(d)(1) provides as follows:

> A 1-year period of limitation shall apply to an application for a writ of *habeas corpus* by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral appeal; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Section 2244 further provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

Following the enactment of this one-year period of limitations, the Third Circuit Court of Appeals interpreted this amendment to provide for a "one year grace period" following its effective date of April 24, 1996. *See Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998) ("applying § 2244(d)(1) to bar the filing of a *habeas* petition before April 24, 1997, where the prisoner's conviction became final before April 24, 1996, would be impermissibly retroactive").

Ackeridge's judgment of sentence became final on or about January 6, 1997, thirty days after he was sentenced,

because he failed to file an appeal in the Pennsylvania Superior Court. Because his judgment of sentence was final prior to the enactment of the one-year period of limitations, Ackeridge was afforded the protection of the grace period and was required to file a federal *habeas* petition on or before April 23, 1997. However, Ackeridge filed the instant petition over two years after the grace period had expired. Thus, the petition is untimely and must be dismissed unless Ackeridge can establish that he is entitled to a tolling of the period of limitations.

A review of the circumstances of this case, however, reveals that Ackeridge cannot satisfy the requirements of the tolling provision. As set forth above, only "the time during which a properly filed application for State post-conviction or other relief with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). *See Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998) (properly filed state petition for post-conviction review is one that is "submitted according to the state's procedural requirements, such as the rule governing time and place for filing"). According to the pleadings, Ackeridge has not made any attempt to have his judgment of sentence reviewed in the state courts.

Finally, this court must conclude that Ackeridge does not satisfy any of the exceptions to the period of limitations set forth in § 2244(d)(1)(B)-(D). Ackeridge does not allege any state action that prevented him from filing his petition; he does not assert any claim that relies on a new rule of retroactively applicable constitutional law; and the factual predicates upon which his claims are based concern events that occurred at trial, and thus, were discoverable in the exercise of due diligence.

Having concluded that this petition is untimely and fails to meet any exception to the limitations period of § 2244(d)(1), this court makes the following:

RECOMMENDATION

AND NOW, this 21st day of March, 2000, IT IS RESPECTFULLY RECOMMENDED that the petition for a writ of *habeas corpus* be DISMISSED with prejudice. It is also RECOMMENDED that a certificate of appealability not be granted.

BY THE COURT:

/s/
JAMES R. MELINSON
CHIEF U.S. MAGISTRATE JUDGE